



MAKAH TRIBE

P.O. BOX 115 • NEAH BAY, WA 98357 • 360-645-2201



February 11, 2005

William T. Hogarth, Ph.D.
Assistant Administrator
National Oceanic and
Atmospheric Administration
Room 14636
1315 East-West Hwy
Silver Spring, MD 20910

Re: Makah Tribe's Request for a Waiver of the Marine Mammal Protection Act (MMPA) Take Moratorium

Dear Dr. Hogarth,

Under the 1855 Treaty of Neah Bay, the Makah Tribe secured an express right to hunt whales throughout its usual and accustomed grounds and stations. The Makah Tribe's express whaling rights have not been abrogated by any subsequent statute including the Marine Mammal Protection Act (MMPA). Nevertheless, the Ninth Circuit Court of Appeals has held that, notwithstanding the Makah Tribe's express whaling rights under the Treaty of Neah Bay, the National Oceanic and Atmospheric Administration (NOAA) must waive the MMPA take moratorium before the Tribe may exercise its Treaty whaling rights. *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

Consider this letter and the attached application the Tribe's formal request for a waiver of the take moratorium under Section 101(a)(3) of the MMPA, 16 U.S.C. § 1371(a)(3), to allow a ceremonial and subsistence (C&S) harvest from the Eastern North Pacific stock of gray whales (*Eschrichtius robustus*) within the Makah Tribe's adjudicated usual and accustomed grounds. See *United States v. Washington*, 626 F.Supp. 1405, 1467 (W.D.Wash. 1985). The total take of gray whales for which the Tribe seeks a waiver is up to 20 gray whales in any five-year period subject to a maximum of five gray whales in any calendar year.

In accordance with Section 101(a)(3) of the MMPA, the Tribe asks you to determine that it is compatible with the Act to waive the moratorium to allow for the taking of whales requested in this letter and attached application, and to adopt suitable regulations and make determinations in accordance with Sections 102, 103, and 104 of the Act. We also ask you to simultaneously undertake a National Environmental Policy Act review of the Tribe's request.

The Tribe believes that approval of this request is consistent with the purposes and policies set forth in Section 2 of the MMPA and is necessary for the United States to fulfill its fiduciary obligations to the Tribe under the Treaty of Neah Bay. As shown in the attached

application, the Tribe's requested harvest of gray whales will ensure that gray whales remain a significant functioning element in the ecosystem and will not permit the Eastern North Pacific gray whale stock to fall below its optimum sustainable population.

The Tribe thanks you in advance for your attention to this important matter.

Sincerely,

MAKAH TRIBAL COUNCIL

A handwritten signature in blue ink, reading "Ben Johnson Jr.", is positioned above the printed name.

Ben Johnson, Jr.
Chairman

CC: Rolland Schmitten, U.S. IWC Commissioner
Laurie Allen, Director, NOAA Office of Protected Resources
Karl Gleaves, General Counsel for NOAA/NMFS/OPR
Robert Lohn, NOAA Fisheries Northwest Regional Administrator
Joe Scordino, NOAA Fisheries Northwest Deputy Regional Administrator
David Cottingham, Executive Director, Marine Mammal Commission
Michael Gosliner, General Counsel, Marine Mammal Commission
Stanley Speaks, BIA Northwest Regional Director